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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LOUIS JOSEPH DiBERNARDO, Defendant and Appellant.	G049920 (Super. Ct. No. SWF10001053) O P I N I O N

Appeal from judgments of the Superior Court of Riverside County, Albert J. Wojcik and Angel M. Bermudez, Judges. Affirmed as modified.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Louis Joseph DiBernardo was charged with murder, simple kidnapping, and making a criminal threat. The amended information also alleged defendant personally used a firearm in committing all three crimes.

At his first trial, the jury returned guilty verdicts on the kidnapping and criminal threat charges and found the firearm allegation true as to each offense. But it failed to reach a verdict on the murder count and a mistrial was declared on that count. After a second trial, defendant was found guilty of second degree murder and to have personally used a firearm in committing the crime.

The court sentenced defendant to 37 years to life in prison. The sentence consisted of a 12-year determinate term for kidnapping and the attached firearm use allegation, a concurrent sentence on the criminal threat count and enhancement, plus a consecutive 15 years to life term for the murder with an additional 10 years for the attached firearm use allegation. The trial judge declared he would retain jurisdiction to determine the amount of victim restitution (Pen. Code, § 1202.4), but the abstract of judgment prepared for defendant's life sentence contains an $80,578 restitution award.

Defendant challenges the sufficiency of the evidence to support the asportation element for his kidnapping conviction and contends the trial court erred by modifying the instruction for this crime. On the murder conviction, he raises evidentiary and instructional error claims. Defendant also argues the restitution award was entered in error and is not supported by the evidence. The Attorney General concedes the restitution award should be deleted, but otherwise urges we affirm the judgments.

BACKGROUND

In the early evening hours of May 12, 2010, defendant shot and killed Victor Borcherds (Victor) inside a residence that defendant and his wife Sherry DiBernardo owned, but which was then occupied by Victor and his wife Suzanne

Borcherds. The shooting was the culmination of a civil dispute between the couples over the Borcherds' occupation and use of the property.

The home, referred to by the parties as "the castle," is a 9 bedroom, 10 bath house in Temecula the DiBernardos built themselves and operated as a bed and breakfast under a limited liability company. In early 2009, the DiBernardos were experiencing financial difficulties and had filed for bankruptcy. They listed the castle for sale at $3.2 million intending to use the proceeds to fund their bankruptcy reorganization. Shortly thereafter, they met the Borcherds who expressed an interest in buying the castle to operate a sewing or quilting business.

The couples entered into an agreement whereby the Borcherds leased the castle from the DiBernardos at a monthly rent of $18,000 with an option to purchase it. Mrs. DiBernardo testified that after the Borcherds took possession they failed to pay the full amount of each month's rent. By January 2010, the Borcherds were over $88,000 in arrears on rent payments.

In November, the parties entered into a second agreement, drafted by the Borcherds, whereby the Borcherds exercised the option to purchase the property. As part of this proposal, defendant was introduced to a man named Louis Perez, represented to be the owner of commercial real estate, who was willing to assist the Borcherds in buying the castle. Defendant testified Perez promised to deposit $400,000 into escrow and give the DiBernardos a personal promissory note for $1 million. The contract contained clauses stating the Borcherds did not owe any back rent and would not need to pay rent in the future.

An escrow was opened but the sale transaction was never consummated and the parties ended up suing each other. The Borcherds sought specific performance of the purchase agreement and filed a lis pendens to prevent the DiBernardos from selling the property to a third party. In turn, the DiBernardos brought an unlawful detainer action against the Borcherds.

The defense also presented evidence the Borcherds engaged in conduct that dissuaded other potential buyers and made structural changes to the home the DiBernardos believed reduced its value.

DEFENDANT'S FIRST TRIAL

1. The Evidence

Mrs. Borcherds testified that shortly after 5:00 p.m., she was at the castle working in the sewing workshop that had been set up in the garage. This space had four means of access, including two sliding glass doors that led to a parking area.

She saw defendant standing off to her side holding a gun. Mrs. Borcherds testified he told her to turn off the sewing machine and then forced her to walk in front of him passing through the kitchen, a family room/dining area with a connected bar, to the living room. There defendant taped her hands together behind her back and sat her down.

According to Mrs. Borcherds, defendant then took her upstairs to "make sure there was nobody" else home, walking her to a room located over the sewing workshop. Mrs. Borcherds testified "[h]e just kept saying that I needed to be really careful and to do everything that he said because . . . 'I will kill you. You know that don't you.'" Defendant then led her downstairs to a bedroom adjacent to the living room. This room had a window facing both the front of the residence and the driveway. A police officer testified the distance between the workshop and bedroom was approximately 100 feet.

At some point, defendant cut the tape and allowed Mrs. Borcherds to use the bathroom, but stood outside of it with the door open. He then led her back to the bedroom, again taped her hands together, and ordered her to sit on the bed. He kept peeking through the window's blinds. Throughout this ordeal defendant repeatedly said

that the Borcherds were not going to "steal" his house and that he intended to kill Victor before killing himself.

Defendant testified in his own defense. He claimed his wife called him while he was at a local airport washing his airplane. She told him that Victor had attended her deposition earlier that day. Defendant testified his wife's description of Victor's behavior and comments during the deposition made him "[a]ngry." As he continued to wash his airplane, his "aggravation just got worse and worse" because he believed "Victor thought th[e litigation] was a freaking game."

He then decided to go to the residence and forcibly evict the Borcherds. Defendant parked his vehicle on a dirt road below the residence where he had a storage unit and kept a trailer. Claiming he was afraid of Victor, defendant retrieved a gun from the trailer so the Borcherds "would be afraid and . . . would leave." He then walked to the front of the house and entered it.

Encountering Mrs. Borcherds in the sewing workshop, defendant asked about Victor's whereabouts and said he was "tired of them cheating and lying and stealing from me." Mrs. Borcherds stated she needed to use the bathroom and he followed her, checking the bathroom before she entered. Defendant acknowledged he "left the door [to the bathroom] open about 3 inches" while Mrs. Borcherds was using it.

He then told her to sit in a chair in front of the bar. Defendant admitted using duct tape obtained from a tool box to bind Mrs. Borcherds' hands behind the back of a chair while he went upstairs to see if anyone was present. Upon returning, defendant claimed he cut the duct tape on Mrs. Borcherds' hands. The two walked to the nearby bedroom where Mrs. Borcherds sat on the bed. Defendant denied threatening to kill anyone, claiming he only told Mrs. Borcherds he "wanted her and Victor to get all their crap out of my house."

Upon Victor's return home he entered the bedroom. At that point the gun discharged three times with the last shot striking Victor in the abdomen. Mrs. Borcherds and defendant presented conflicting testimony on how the shooting occurred.

2. Sufficiency of the Evidence to Support the Kidnapping Verdict

Count 2 charged defendant with violating Penal Code section 207, subdivision (a). It declares, "[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Conviction for this crime requires the "the prosecution . . . prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance." (*People v. Jones* (2003) 108 Cal.App.4th 455, 462.) Defendant seeks to reduce his kidnapping conviction to false imprisonment, arguing the evidence presented at the first trial failed to support the third element.

The resolution of this issue is governed by the familiar substantial evidence doctrine. "'[A]n appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence—which we repeatedly have described as evidence that is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment 'the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Vines* (2011) 51 Cal.4th 830, 869.) We """"accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]""""" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1015.) Here, the evidence supports the jury's verdict.

In *People v. Martinez* (1999) 20 Cal.4th 225, the Supreme Court explained simple kidnapping's substantial distance element meant "'a distance more than slight or trivial'" and, "where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*Id.* at p. 237.) "In addition, in a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality." (*Ibid*.)

Defendant claims the asportation element is missing because Mrs. Borcherds was moved only a short distance to a bedroom near the front door. He argues this location increased the likelihood of detection and the other factors were at best merely neutral on the a substantial distance issue. But his argument pays only lip service to the substantial evidence doctrine.

The prosecution presented testimony that defendant moved Mrs. Borcherds well over 100 feet, first from the sewing workshop to the living room, then upstairs to a room over the workshop to check for the presence of others, then to a downstairs bathroom, and finally a bedroom adjacent to the living room and front door. Mrs. Borcherds testified the sewing room had four means of access, while the bedroom had only a single door. In addition, the bedroom window overlooked the front of the property, allowing defendant to observe the approach of Victor or anyone else coming to the residence. As noted, "[w]e presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Thus, "a reviewing court is not permitted to reverse a conviction on the ground of insufficient evidence simply because the facts could be

reconciled with a finding of innocence, or of guilt of a lesser crime." (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1436.)

Cases have found movements of shorter distances sufficient to support conviction where, as here, there was evidence supporting the existence of other relevant factors. (*People v. Arias, supra,* 193 Cal.App.4th at p. 1435 ["A rational trier of fact could have concluded th[e victim] was involuntarily moved 15 feet [from a public area] to the inside of his apartment in order to allow defendant to facilitate his search for [rival] gang members"]; *People v. Smith* (1995) 33 Cal.App.4th 1586, 1594 [movement of 40 to 50 feet from a driveway open to public view to inside a camper sufficient to support enhancement for rape committed during a kidnapping].) Here, there was evidence from which the jury could rationally conclude defendant's repeated threats to shoot Mrs. Borcherds if she failed to obey him and his movement of her from a room with four means of access to one with only a single door, increased the risk of harm to her and decreased the possibility of her ability to attempt an escape. (*People v. Jones* (1999) 75 Cal.App.4th 616, 630 [movement of 25 to 40 feet; "An increased risk of harm was manifested by appellant's demonstrated willingness to be violent"].)

Defendant also claims the movement was merely incidental to his killing Victor. In *People v. Bell* (2009) 179 Cal.App.4th 428, drawing on "the aggravated kidnapping statutes and the decided cases," we held the phrase "'associated crime,' as that phrase was used by the *Martinez* court, is *any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will." (*Id.* at pp. 438-439.)

Here, there was evidence defendant intended to kill Victor when he entered the castle and defendant forcibly moved Mrs. Borcherds to a room where he could observe Victor's arrival. The murder charge contained special circumstance allegations of murder while lying in wait and in the commission of a kidnapping. During closing

argument, the prosecutor acknowledged defendant's asportation of Mrs. Borcherds "quite obviously" "help[ed] the defendant" kill Victor.

But in *Bell* we recognized that even where the evidence supports a finding there was an associated crime, the consideration of whether a kidnapping under Penal Code section 207, subdivision (a) was incidental to that associated crime is only "one of the *additional* factors to be considered *in determining the movement's substantiality* . . . under the 'totality of circumstances' test enunciated in *Martinez*," and "*not* a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the substantiality of the movement . . . ." (*People v. Bell, supra,* 179 Cal.App.4th at p. 440.) For this reason, defendant's reliance on *People v. Dacy* (1970) 5 Cal.App.3d 216, is unavailing because that case involved a conviction for *aggravated* kidnapping in violation of Penal Code section 209. *Martinez* recognized that, unlike simple kidnapping, a conviction for aggravated kidnapping "*requires* movement of the victim that is not merely incidental to the commission of the underlying crime . . . ." (*People v. Martinez, supra,* 20 Cal.4th at p. 232, italics added.)

Thus, we conclude the evidence was sufficient to support defendant's kidnapping conviction.

3. Instructional Error

The trial court instructed the jury on the kidnapping charge with CALJIC No. 9.50. However, it deleted the portion of the instruction stating, "[i]f an associated crime is involved, the movement also must be more than that which is incidental to the commission of the other crime." (CALJIC No. 9.50.) In his supplemental brief, defendant argues the court's failure to give this portion of the jury instruction constituted reversible error. We agree the court committed error, but find it harmless.

Initially, we agree with the Attorney General's comment the portion of CALJIC No. 9.50 that the trial court deleted is an erroneous statement of the law. It

states: "If an associated crime is involved, *the movement also must be more than that which is incidental* to the commission of the other crime." (Italics added.) *Martinez* held "the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of [an associated] crime in determining the movement's substantiality." (*People v. Martinez, supra,* 20 Cal.4th at p. 237.) And in *Bell*, we recognized "whether the movement was over a distance merely incidental to an associated crime is simply one of several factors to be considered by the jury (when permitted by the evidence) under the 'totality of circumstances' test," and "*not* a separate threshold determinant of guilt or innocence, separated from other considerations bearing on the substantiality of the movement." (*People v. Bell, supra,* 179 Cal.App.4th 440.) Thus, as phrased, it would have been error for the trial court to give the deleted portion of CALJIC No. 9.50. The court should have given CALCRIM No. 1215. It correctly explains "whether the distance . . . was beyond that merely incidental to the commission of" an associated crime was a factor the jury could consider in determining whether Mrs. Borcherds was forcibly moved a substantial distance.

However even as given, CALJIC No. 9.50 was incomplete because, in explaining the charge's asportation element, the trial court failed to tell to the jury that it could also consider whether the distance defendant moved Mrs. Borcherds was incidental to the commission of the associated homicide. As noted above, there was evidence "sufficient to show the relationship between [Mrs. Borcherds'] kidnapping and" defendant's fatal encounter with Victor. (*People v. Bell, supra,* 179 Cal.App.4th at p. 439.)

"'"[I]n criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

This sua sponte duty "has been extended to require instructions on every material *element* of an offense." (*People v. Flood* (1998) 18 Cal.4th 470, 480.)

Misinstruction of the jury on an element of a charged crime is reviewed under the federal constitutional harmless error standard. (*People v. Harris* (1994) 9 Cal.4th 407, 416; see *Pope v. Illinois* (1987) 481 U.S. 497, 502-503 [107 S.Ct. 1918, 95 L.Ed.2d 439].) *Bell* applied this approach in assessing the prejudice resulting from a failure to instruct on the incidental movement factor. (*People v. Bell, supra*, 179 Cal.App.4th at p. 439.) Thus "'reversal of the . . . conviction is required unless we are able to conclude that the error was harmless beyond a reasonable doubt.'" (*People v. Harris, supra,* 9 Cal.4th at p. 416; see *People v. Bell, supra,* 179 Cal.App.4th at p. 439.)

"In assessing prejudice, we consider whether 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' [Citations.] Further, '[t]o say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citations.] The evidence must be '"of such compelling force as to show beyond a reasonable doubt" that the erroneous instruction "must have made no difference in reaching the verdict obtained."' [Citations.]" (*People v. Chavez* (2004) 118 Cal.App.4th 379, 387.) "In making this determination, we have considered the specific language challenged, the instructions as a whole and the jury's findings." (*People v. Cain* (1995) 10 Cal.4th 1, 36; see *People v. Bell, supra*, 179 Cal.App.4th at p. 439.) Another factor to consider is the parties' closing arguments. (*People v. Lee* (1987) 43 Cal.3d 666, 677-678 [conflicting instructions on whether specific intent to kill required to support conviction harmless; "The parties' closing jury arguments focused upon the necessity of finding a specific intent to kill"]; *People v. Hayes* (2009) 171 Cal.App.4th 549, 560 ["Closing arguments to the jury are relevant in assessing prejudice from instructional error"].)

The only defect in the first trial's instruction was the absence of the incidental movement factor in describing the asportation element of simple kidnapping. *Bell* explained, "an 'associated crime,' as that phrase was used by the *Martinez* court, is *any* criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will. It is not more complicated than that." (*People v. Bell, supra,* 179 Cal.App.4th at pp. 438-439.) While the jury found defendant guilty of kidnapping Mrs. Borcherds, it could not agree on the homicide charge. Further, on the kidnapping charge defense counsel's closing argument focused on who was a more credible witness; Mrs. Borcherds or defendant. Citing contradictions between her statements in police interviews after the shooting and her trial testimony, counsel asserted "the only evidence you have of kidnapping came from [Mrs. Borcherds]," and argued she "lied to you under oath in this courtroom on that stand . . . ." In short, rather than focus on the factors relevant to whether defendant moved Mrs. Borcherds a substantial distance, the defense claimed there never was any forcible movement of her at all.

Given the evidence, the presence of single instructional misstep, the jury's inability to agree on the homicide charge, and the defense's theory of the case, we conclude the trial court's failure to inform the jury of the asportation element's incidental movement factor made no difference in the outcome of the first trial.

DEFENDANT'S SECOND TRIAL

1. The Evidence

Mrs. Borcherds testified that on the morning of the day Victor was killed, he left the castle to attend Mrs. DiBernardo's deposition. Later, that afternoon while she was working in the sewing workshop, Mrs. Borcherds saw defendant standing nearby

holding a gun. In a loud and angry voice, he swore at her and said she and Victor "were wrong" if they thought they "were gonna . . . steal his house."

According to Mrs. Borcherds during the time defendant forcibly moved her about the castle he repeatedly said "he was going to kill us," their children, and their attorney before killing himself. When making these statements, defendant "was just pretty calm" "[a] lot of the time," but "[s]ometimes he got louder."

When Victor arrived home, defendant told Mrs. Borcherds to remain quiet. As Victor entered the bedroom, defendant shouted at him to sit on the floor. Defendant said he was "'not gonna let you steal my effin' house. I'm here to take care of business.'" Victor moved towards his wife and defendant fired a shot. Then Victor said "'please don't do this,'" at which point defendant fired a second shot. Defendant then fired again, striking Victor in the abdomen. Mrs. Borcherds denied her husband threatened defendant or lunged towards him before the final shot. Defendant called 9-1-1. Victor was taken to a hospital, but died from his wound.

Deputy Sheriff Carlos Gutierrez testified he was the first officer to arrive at the scene. As Gutierrez approached the residence, defendant walked towards him with arms raised and said, "'I surrender.'" Defendant calmly admitted shooting Victor and told the deputy where he placed the gun and its magazines. A criminalist who inspected and tested the handgun testified it functioned properly and would not discharge unless the trigger was pulled. It took five and one-half pounds of pressure to pull the trigger in single action mode and ten and one-half pounds of pressure in double action mode.

The defense presented evidence defendant was emotionally and physically distraught over the financial difficulties he and his wife were experiencing, including the lease, purchase agreement, and subsequent litigation with the Borcherds. There was testimony defendant was not eating, had difficulty sleeping, appeared stressed and depressed.

Tom Flores, a real estate agent hired by the DiBernardos in April 2009 to list the castle for sale, testified the lease-option agreement between the DiBernardos and the Borcherds allowed him to continue to showing the property to potential buyers while the Borcherds occupied the residence. According to Flores, the Borcherds were initially cooperative, but over time their attitude changed. They began to make negative comments about the castle in front of potential buyers. Flores also said the cosmetic and structural changes the Borcherds made to the castle reduced its value.

In April 2010, the DiBernardos conducted an inspection of the castle taking photographs of the changes made by the Borcherds. Mrs. DiBernardo testified they were "sickened" by what they saw during the inspection. Both Mrs. DiBernardo and defendant testified they had also found one or two other buyers for the castle.

Mrs. DiBernardo testified that after her deposition, she spoke to defendant by telephone. She told defendant that Victor had asked her to sign over the deed to the castle. She said Victor claimed the bank holding the second trust deed on the property planned to foreclose on it the next day, and if the bank did so, "the game changes." She also mentioned a conversation with their attorney about paying the Borcherds $100,000 to settle the case. According to Mrs. DiBernardo, defendant became very quiet and in a quivering voice told her to come home and they would talk about the matter.

Defendant testified he "thought [he] was getting screwed by" the Borcherds. After the April 2010 inspection, defendant spoke with the Borcherds and offered to pay them $50,000 to settle the litigation with the condition they hire a licensed contractor to make all repairs to the property. Victor responded that he would "tie my house up for years until I paid him $100,000." Defendant described this demand as "blackmail." He referred to the Borcherds as "professional extortionists," and claimed he "even called the cops," but was "told . . . it was a civil matter." Defendant also claimed that he was forced to sell stock "for about fifty cents, forty cents on the dollar" simply to make the payments on the first trust deed.

When his wife called, defendant was at the airport getting his airplane ready for a day-long trip planned for the following day. After the telephone call it took him another 30 to 40 minutes to complete his flight preparations. While doing so, he decided to make the 15 minute drive to the castle to "evict [the Borcherds]" so he could sell the property. Denying that he had an intent to kill anyone, defendant testified he believed he was "being victimized by the Borcherds" and "need[ed] to just get them out."

Defendant parked his vehicle on the property's lower level near his trailer to retrieve a gun and an extra magazine of bullets before entering the house. He claimed he retrieved the gun "to intimidate" the Borcherds.

According to defendant the shooting was accidental. He testified that he and Mrs. Borcherds were in the bedroom conversing when Victor suddenly entered talking on a cell phone. Victor's appearance "startled" him. Defendant "flinched," causing the gun to discharge. He told the Borcherds he was "tired of their victimizing us, taking advantage of us," and to get their "'crap out of my house tonight.'" He admitted he was angry, spoke in an "elevated" voice, and that his heart was "racing." While speaking, defendant pointed the gun towards a chair where he wanted Victor to sit and the gun inadvertently discharged a second time. Victor began walking to the chair, but suddenly turned and, in a crouched position, stepped toward defendant with his hands outstretched. Defendant claimed he backed up bumping into a book shelf, thereby causing the gun to fire again and strike Victor.

After the shooting, defendant called 9-1-1, requesting an ambulance. He then opened the front door. Defendant called his son-in-law who was a deputy sheriff and followed the son-in-law's directions on disarming the gun, placing it in a safe place, and on how to respond when the police arrived.

2. Exclusion of Defense Evidence

Defendant challenges several of the court's evidentiary rulings. "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) We conclude the rulings were not erroneous and any possible error was clearly harmless.

a. Prior Bad Acts

(1) The Borcherds' Previous Commercial Ventures

In a pretrial in limine motion, the defense sought permission to introduce evidence on the Borcherds' commercial activities in the 1980's and 1990's, which it described as "shady business dealings." One transaction involved Victor's ownership of a company named Southern American Insurance Company (Southern) that was eventually taken over by the State of Utah. Allegedly Southern made loans to a corporation owned by Mrs. Borcherds, but her business eventually filed for bankruptcy. Another allegation was that on one occasion a federal bankruptcy court denied a discharge to Victor after finding he had engaged in fraud. Finally, in another bankruptcy filing, Victor listed millions of dollars in state and federal tax liens as liabilities.

Defense counsel argued this evidence showed "prior bad acts . . . of the victim and complaining witness," which spoke "to the litigation between . . . the Borcherds and the DiBernardos . . . ." The trial court excluded the evidence, finding it had "very little probative value" and was outweighed by the potential confusion of the issues and consumption of time needed to present this evidence. Defendant contends the trial court erred by excluding this evidence.

The court did not err. In line with the general rule cited above, rulings that concern Evidence Code sections 1101 and 352 are subject to review for abuse of discretion. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1256-1257 [Evid. Code, § 1101]; *People v. Fuiava* (2012) 53 Cal.4th 622, 663 [Evid. Code, § 352].) Except for the bankruptcy court judgment, which denied Victor a discharge for fraudulent activity, none of the unsuccessful business activities, including the imposition of the tax liens, constituted "a crime or civil wrong." (Evid. Code, § 1101, subd. (b).) Further, as the trial court noted, introduction of evidence to establish these endeavors would require an enormous amount of trial court time on what amounted to, at best tangential issues and ran the risk of confusing the jury about the issues central to this case. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1097, overruled on another point in *People v. Black* (2014) 58 Cal.4th 912, 919 [witness's prior false sexual assault claims properly excluded; "value of the evidence as impeachment depends upon proof that the prior charges were false," "would in effect force the parties to present evidence concerning two long-past . . . incidents which never reached the point of formal charges," and "consume considerable time, and divert the attention of the jury from the case at hand"].)

As for the denial of Victor's bankruptcy discharge, defendant argues it could easily be established through judicial notice. But Victor was not going to be a witness at trial. Furthermore, contrary to defendant's argument the judgment would not be admissible in any event. A judgment offered to prove a matter determined by the ruling is merely inadmissible hearsay. (*People v. Wheeler* (1992) 4 Cal.4th 284, 298.) No abuse occurred.

(2) Victor's "Bragging"

Defendant cites the trial court's refusal to allow Flores, the real estate agent, to be questioned on Victor's "bragging" that he had filed numerous bankruptcies. The defense claimed this testimony would show the Borcherds "didn't have the financial

wherewithal" to buy the castle. Again, the trial court properly excluded the testimony under Evidence Code section 352.

First, we note that, except for summarizing the record on this ruling, defendant fails to present any argument or authority in support of why it was erroneous. As such, he has waived the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) What's more, the trial court did not abuse its discretion in excluding this testimony. Defendant cites no authority that a person who has filed for bankruptcy cannot later qualify to buy a house. There was no showing Flores was a financial expert or had run a credit check on the Borcherds. Further, the trial testimony indicated the DiBernardos agreed to sell the house to the Borcherds on the strength of Mr. Perez's promise to provide financing and give them a $1 million promissory note.

(3) The Thomases' Proffered Testimony

Again, during trial the defense unsuccessfully sought to present the testimony of a couple named the Thomases who owned a winery in Temecula. According to the offer of proof, the Thomases were prepared to testify that in early 2009, the Borcherds approached them on three occasions with business proposals. First, they purportedly offered to buy a $1 million house near the winery. Later, the Borcherds asked if the Thomases would allow them to lease the winery for quilting seminars. Finally, the Borcherds proposed they operate the winery's bed and breakfast business in return for only minimum wage. Defense counsel stated the Thomases decided not to do business with the Borcherds after conducting an Internet search and concluding they "were running a con." He argued this evidence was admissible to impeach Mrs. Borcherds, describing the Thomases as "potential victims of the Borcherds that did not pan out . . . ." The court found the proffered testimony both irrelevant and excludable under Evidence Code section 352 because it did not show a bad act and did not "go to witness credibility."

Defendant repeats the claim the Thomases' proffered testimony was relevant to impeach Mrs. Borcherds. But as the trial court found it did not reflect "a crime[or] civil wrong." (Evid. Code, § 1101, subd. (b).) Thus it was irrelevant. (Evid. Code, § 350.) "'[E]xclusion of evidence that produces only speculative inferences is not an abuse of discretion.' [Citation.]" (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "We agree with the trial court that the connection between the excluded evidence and the issues in this trial was unduly tenuous." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 663.)

b. Defendant's State of Mind

During defendant's testimony, he made several attempts to mention the Borcherds purported prior misconduct the trial court had previously ruled was inadmissible. The trial court sustained the prosecution's objections and struck the testimony. At one point, the court even considered imposing sanctions on defendant for his contemptuous behavior.

Defendant argues the trial court's rulings were error because he was merely explaining what he was thinking and thus it was admissible under Evidence Code section 1250. Again, we review the court's ruling for abuse of discretion. (*People v. Ervine* (2009) 47 Cal.4th 745, 778; *People v. Edwards* (1991) 54 Cal.3d 787, 820.) Here, we find none.

The trial court did not deny defendant the right to testify to his state mind before the shooting. He was allowed to explain that he was angry at the Borcherds and felt he was being "screwed" by them. Defendant described them as "extortionists" and claimed he considered Victor's $100,000 settlement proposal blackmail. What the court excluded concerned references to specific acts of misconduct it had previously found inadmissible and defendant's mention of "other knowledge that I have of [the Borcherds]

that I can't talk about." We conclude the court's limitation on defendant's testimony concerning his state of mind was not error.

Defendant also attacks the trial court's limitation on statements he made after he shot Victor. The trial court allowed defendant to testify that immediately after the shooting he said, "'I didn't mean that,'" and Mrs. Borcherds responded, "'I know.'" The court also permitted defendant to testify that when he called his son-in-law, he said, "'I accidentally just shot Victor.'" Defendant's son-in-law was allowed to corroborate defendant, testifying that defendant said "there was an accident; a mistake had happened." However, the court disallowed statements defendant later made to a police officer and to his daughter, finding, "once law enforcement is involved" it viewed "[t]he statements . . . to be . . . inherently unreliable."

We conclude the trial court also did not err in limiting the extent of defendant's post-shooting statements. Evidence Code section 1250 allows the admission of "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation" if "[t]he evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time." (Evid. Code, § 1250, subd. (a)(1).) But this statute is "[s]ubject to [Evidence Code] Section 1252." (Evid. Code, § 1250, subd. (a).) Evidence Code section 1252 states "[e]vidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." "To be admissible under . . . section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are '"made at a time when there was no motive to deceive."'" (*People v. Edwards, supra,* 54 Cal.3d at p. 820.) This rule applies even where, as here, a defendant testifies in his own defense. (*People v. Ervine, supra,* 47 Cal.4th at pp. 777-779.) The trial court's distinction between defendant's statements immediately after the shooting and his later statements was a proper exercise of its discretion.

Defendant alternatively claims the court's rulings "infringed upon [his] constitutional right to present a defense." Not so. "'[T]he ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 52.) "'[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense,"' [citations], but we have also recognized that '"state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,"' [citations]." (*Nevada v. Jackson* (2013) 569 U.S. ___, ___ [133 S.Ct. 1990, 1992, 186 L.Ed.2d 62, 66].) Thus, "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote . . . ." (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [126 S.Ct. 1727, 164 L.Ed.2d 503].) Here, the court's limitation on defendant's testimony as to what he thought of the Borcherds and their conduct with respect to the castle before he shot Victor did not contravene constitutional limitations.

c. Borcherds' Demeanor at Mrs. DiBernardo's Deposition

Next, defendant attacks the trial court's exclusion of Mrs. DiBernardo's testimony about how Victor acted when she was being deposed. At trial, defense counsel sought to admit this testimony to show Victor "was trying to . . . intimidate her" and went "to credibility of the Borcherds and . . . their motive . . . and their intent about this whole deal. It was to swindle the castle." On appeal, defendant argues "[t]his testimony would have supplied further proof that [his] suspicions were correct – that Victor's actions were aimed at swindling [t]he [c]astle from the DiBernardos." We agree with the trial court's conclusion the proffered testimony "sounds like positional negotiations." Further it was merely cumulative. Defendant testified about how his wife sounded when she called him after the deposition. And Mrs. DiBernardo testified on how defendant responded to her recitation of what Victor had said to her. The trial court did not err.

d. The Lease Documents

As noted, there was testimony concerning both the original lease-option agreement and the subsequent purchase contract executed by the parties. Citing Evidence Code section 352, the court excluded the lease-option agreement and allowed the introduction of only two clauses in the purchase agreement. Defendant attacks this ruling as well.

The trial court properly limited the admission of this evidence to avoid confusion of the issues in this trial. Defendant argues this evidence was admissible under Evidence Code section 356 ["Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party"]. But he acknowledges the purpose of this statute "is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) As the Attorney General notes, defendant has "fail[ed] to identify any misleading impression" resulting from the trial court's decision to admit only portions of these documents. Given the extensive testimony by defendant and Mrs. DiBernardo about the terms of the agreements and their understanding of them, including defendant's belief he the right to physically remove the Borcherds from the castle, there was no potential for the jury to be misled by the failure to have the entirety of both contracts before them.

e. Exclusion of Mrs. Borcherds' Inconsistent Statement

Next, defendant argues the trial court erred in barring him from impeaching Mrs. Borcherds with an inconsistent statement on whether she attempted to warn her husband not to enter the bedroom. The court excluded it under Evidence Code section 352. Defendant claims the testimony was relevant to Mrs. Borcherds' credibility. (Evid. Code, § 780, subd. (h).) But he acknowledges the defense was allowed to impeach

Mrs. Borcherds with other inconsistent statements, e.g., defendant moved both her and Victor to the bedroom and that she had to plead with defendant to call 9-1-1. We conclude the trial court's exclusion of a single inconsistent statement, if error, was harmless. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.)

f. Use of the Prior Kidnapping Conviction for Impeachment

Defendant's final evidentiary claim is that the trial court initially ruled the prosecution could impeach both him and his three character witnesses with the kidnapping conviction at his first trial. As the Attorney General points out and defendant concedes in his reply brief, the court initially held the prior conviction could only be used against defendant if he claimed to have "a blameless life," but later exercised its discretion under Evidence Code section 352 to bar the use of the prior conviction to impeach defendant. The court also reached the same conclusion with respect to defendant's character witnesses.

In his reply brief, defendant argues the trial court's initial ruling that the kidnapping conviction could be used for impeachment restricted his testimony. But as the Attorney General notes defendant nonetheless did at one point testify "I've never been in trouble before I met the[Borcherds]." The trial court struck that statement because it was nonresponsive. Clearly, the trial court's initial ruling on the kidnapping conviction's admissibility did not hamper defendant's testimony.

3. Instructional Error

Defendant raises two instructional error claims. First, he argues the trial court had a sua sponte duty to instruct the jury on voluntary manslaughter during the commission of an inherently dangerous felony. This theory is no longer valid. In *People v. Bryant* (2013) 56 Cal.4th 959, the Supreme Court declared, "The offenses we have held to constitute voluntary manslaughter are distinct from the offense we consider here.

A defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life. . . . [¶] Because a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter, the trial court could not have erred in failing to instruct the jury that it was." (*Id.* at p. 970.) In so ruling, the Supreme Court disapproved *People v. Garcia* (2008) 162 Cal.App.4th 18 on which defendant relies. (*People v. Bryant, supra,* 56 Cal.4th at p. 970.)

Second, defendant claims the trial court erred by refusing the instruct the jury on voluntary manslaughter based on provocation. The trial court instructed the jury on willful, deliberate, premeditated murder, murder committed while lying in wait, felony murder occurring during kidnapping, second degree murder, and involuntary manslaughter. Both the prosecution and the defense requested the court instruct the jury on voluntary manslaughter based on heat of passion and sudden quarrel. The trial court declined to do so, noting defendant testified he did not intend to kill Victor.

Defendant attacks this ruling. On appeal, the Attorney General argues the trial court did not err in refusing to give a voluntary manslaughter instruction based on provocation because "there was no evidence that the emotions of an objectively reasonable person would have been aroused by the alleged provocations, and there was no evidence that there was insufficient time for the passion of an objectively reasonable person to subside." We agree with the Attorney General.

"'"To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." [Citations.]' [Citation.] [¶] . . . [¶] Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been

sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.] . . . [¶] Subjectively, 'the accused must be shown to have killed while under "the actual influence of a strong passion" induced by such provocation. [Citation.] "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" [Citation.]'" (*People v. Enraca* (2012) 53 Cal.4th 735, 758-759.)

In *Enraca*, the Court "rejected arguments that insults or gang-related challenges would induce sufficient provocation in an *ordinary* person to merit an instruction on voluntary manslaughter." (*People v. Enraca, supra,* 53 Cal.4th at p. 759.) In *People v. Pride* (1992) 3 Cal.4th 195, the Court held "[t]o the extent defendant relies on criticism he received about his work performance *three days* before the crimes, such evidence is insufficient as a matter of law to arouse feelings of homicidal rage or passion in an ordinarily reasonable person." (*Id.* at p. 250.) And as the Attorney General notes the Court of Appeal has held there was no duty to give a voluntary manslaughter instruction in a case where the defendant killed his estranged wife who had filed for divorce and a man with whom she was apparently having affair. (*People v. Lujan* (2001) 92 Cal.App.4th 1389, 1414-1415.)

This case involves a dispute where defendant, unwilling to await the outcome of the civil litigation decided to take justice into his own hands and forcibly evict the Borcherds. He admitted that after talking to his wife he continued working on his plane for another 30 to 40 minutes before then making the 15 minute drive to the castle to carry out his plan. Before entering the home defendant armed himself with a loaded handgun and also retrieved a second magazine of bullets. If his intent was merely to frighten the Borcherds into vacating the castle, there was no need load the weapon or bring a second magazine with him. The prosecution also presented expert testimony that

firing the gun required the use of several pounds of pressure to pull the trigger. This testimony undercut defendant's claim the gun accidentally discharged. The trial court did not err in refusing the voluntary manslaughter instructions.

4. The Restitution Award

The parties agree the abstract of judgment must be corrected to delete the $80,578 restitution award. We will do so.

DISPOSITION

The clerk is directed to prepare an amended abstract of judgment for appellant's indeterminate life sentence that eliminates the award of restitution under Penal Code section 1202.4, and then forward of copy of it to the Department of Corrections and Rehabilitation. As so modified the judgments are affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.